No. 07-1259

In the Supreme Court of the United States

RACHEL HAAS, CAROL HAAS, AND RICHARD HAAS,
PETITIONERS

v.

QUEST RECOVERY SERVICES, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

GREGORY G. GARRE
Acting Solicitor General
Counsel of Record
GRACE CHUNG BECKER
Acting Assistant Attorney General
DIANA K. FLYNN
SARAH E. HARRINGTON
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

The United States, which intervened in this litigation to defend the constitutionality of Title II of the Americans with Disabilities Act of 1990, 42 U.S.C. 12131 *et seq.* (Title II), will address the following question:

Whether the court of appeals correctly applied this Court's decision in *United States* v. *Georgia*, 546 U.S. 151 (2006), in determining that this case does not present the question whether Title II validly abrogates States' Eleventh Amendment immunity.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 2b-7b) is not published in the *Federal Reporter* but is reprinted in 247 Fed. Appx. 670. The opinion of the district court (Pet. App. 23e-40e) is reported at 338 F. Supp. 2d 797.

JURISDICTION

The judgment of the court of appeals was entered on August 21, 2007. A petition for rehearing was denied on November 23, 2007 (Pet. App. 1a). The petition for a writ of certiorari was filed on February 19, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. 12101 *et seq.*, established a "comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. 12101(b)(1). Congress found that, "historically, society has tended to isolate and segregate individuals with disabilities," and that "such forms of discrimination * * * continue to be a serious and pervasive social problem." 42 U.S.C. 12101(a)(2). Discrimination against persons with disabilities, Congress determined, "persists in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services." 42 U.S.C. 12101(a)(3). In addition, Congress found that persons with disabilities

> continually encounter various forms of discrimination, including outright intentional exclusion, the discriminatory effects of architectural, transportation, and communication barriers, overprotective rules and policies, failure to make modifications to existing facilities and practices, exclusionary qualification standards and criteria, segregation, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities.

42 U.S.C. 12101(a)(5). Congress concluded that persons with disabilities

> have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative

> of the individual ability of such individuals to participate in, and contribute to, society.

42 U.S.C. 12101(a)(7). Based on those findings, Congress "invoke[d] the sweep of congressional authority, including the power to enforce the fourteenth amendment," to enact the ADA. 42 U.S.C. 12101(b)(4); see U.S. Const. Amend. XIV, § 5.

The ADA targets three particular areas of discrimination against persons with disabilities. Title I, 42 U.S.C. 12111 *et seq.*, addresses discrimination by employers affecting interstate commerce; Title II, 42 U.S.C. 12131 *et seq.*, addresses discrimination by governmental entities in the operation of public services, programs, and activities; and Title III, 42 U.S.C. 12181 *et seq.*, addresses discrimination in public accommodations operated by private entities.

This case arises under Title II, which provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. 12132. A "public entity" includes "any State or local government" and its components. 42 U.S.C. 12131(1)(A) and (B).

Title II instructs the Attorney General to implement its basic prohibition on discrimination through rulemaking, based on the regulations previously promulgated under Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794 (1988). See 42 U.S.C. 12134. The Attorney General's regulations prohibit a public entity from, among other things, denying a benefit to a qualified individual with a disability because of his disability, providing him with a lesser benefit than is given to others, or limiting his enjoyment of the rights and benefits

that are provided to the public at large. See 28 C.F.R. 35.130(b)(1)(i), (iii) and (vii). To that end, each public entity must ensure that "each service, program or activity, * * * when viewed in its entirety, is readily accessible to and usable by individuals with disabilities." 28 C.F.R. 35.150(a). Title II does not "[n]ecessarily require a public entity to make each of its existing facilities accessible"; however, buildings constructed or altered after Title II's effective date must be designed or redesigned to provide accessibility. 28 C.F.R. 35.150(a)(1), 35.151; see 28 C.F.R. 35.150(b)(1). A public entity must "make reasonable modifications" in its "policies, practices, or procedures" to the extent "necessary to avoid discrimination on the basis of disability," unless the accommodation would impose an undue financial or administrative burden on the public entity, or would fundamentally alter the nature of the service. 28 C.F.R. 35.130(b)(7), 35.150(a)(3).

Title II may be enforced through private suits, and Congress has expressly abrogated the States' Eleventh Amendment immunity in any such suits. See 42 U.S.C. 12133, 12202.

2. Petitioners are an individual with a disability and her parents. In 2002, petitioner Rachel Haas (Haas) was struck by a truck while operating an all-terrain vehicle. Pet. App. 9c. She suffered severe injuries, requiring the partial amputation of her left leg and the implantation of a prosthetic elbow and a metal rod in one arm. *Id.* at 60g. Haas subsequently pleaded guilty in Canton, Ohio, Municipal Court to operating the all-terrain vehicle while under the influence of alcohol. The municipal court sentenced Haas, *inter alia*, to complete two six-day driver-intervention programs conducted by respon-

dent Quest Recovery Services, Inc. (Quest). *Id.* at 60g-61g.

Haas entered a Quest facility in Massillon, Ohio, which allegedly was "constructed, owned, and/or maintained by" the State of Ohio. Pet. App. 61g; see *id.* at 10c. At the time, Haas's injuries required her to use a wheelchair for mobility. *Id.* at 61g. According to Haas, Quest's facilities were not wheelchair-accessible and Quest staff refused to accommodate Haas's needs. *Id.* at 62g.

Haas alleges that upon arrival, she was required to crawl with her luggage up to the sixth floor of the building because the building had no elevator and Quest staff refused to provide assistance. Bathroom and shower facilities were also inaccessible. She was required to "hop, scoot, and crawl up and down the steps without any assistance" to receive meals, which were provided in the building's basement. Pet. App. 62g. On one occasion, Haas fell down a staircase and displaced the metal rod in her arm. *Id.* at 63g. After that, Quest agreed to provide meals to Haas in her room, but then allegedly "'forgot' to deliver the food to her on several occasions." *Id.* at 64g. Finally, although Haas's counselor gave her a favorable review, Quest's director allegedly refused to certify that she had completed the program because "her attitude had been unacceptable." *Ibid.* As a result, Haas was incarcerated for six days. *Id.* at 64g-65g.

3. Haas and her parents filed suit against Quest and the City of Canton in the United States District Court for the Northern District of Ohio. Pet. App. 41f-57f. Petitioners subsequently dismissed the City and filed an amended complaint, adding the State of Ohio as a defendant and alleging that the State had violated both Title II and Section 504 of the Rehabilitation Act. See *id.* at

24e, 58g-73g. The State moved to dismiss the Title II and Rehabilitation Act claims against it, asserting both that it was immune from suit under the Eleventh Amendment and that petitioners failed to state a claim. *Id.* at 12c.

The district court dismissed the Title II claim based on the State's Eleventh Amendment immunity. In the district court's view, Title II does not validly abrogate sovereign immunity except to the extent necessary to vindicate plaintiffs' due process right of access to the courts, which was not at issue in this case. Pet. App. 34e. The court held that petitioners could pursue their claim against the State under the Rehabilitation Act, however: the State had waived sovereign immunity by accepting federal funds, and petitioners had stated a claim against the State in its capacity as owner of the property where the Quest facility is located. *Id.* at 34e-35e, 38e-39e.

The parties subsequently settled the case, except for the Title II claim against the State. Petitioners preserved the right to appeal the dismissal of that claim. The district court entered judgment accordingly. Pet. App. 12c.

4. The court of appeals affirmed. Pet. App. 8c-21c. The court first held that petitioners had failed to state a claim against Ohio under Title II of the ADA because, under circuit precedent, petitioners "did not sufficiently plead that the State of Ohio is responsible for Quest's alleged wrongdoing." *Id.* at 17c.

The court further held, relying on circuit precedent from 2002, that Title II was not a valid exercise of Congress's power under the Fourteenth Amendment to abrogate state sovereign immunity. Pet. App. 17c-21c (relying on *Popovich* v. *Cuyahoga County Court of Com-*

mon Pleas, 276 F.3d 808 (6th Cir.) (en banc), cert. denied, 537 U.S. 812 (2002)). The court noted this Court's decision in *Tennessee* v. *Lane*, 541 U.S. 509 (2004), which had upheld Title II's abrogation of Eleventh Amendment immunity as applied to claims involving access to the courts. Because petitioners did not assert an access-to-courts claim, the court of appeals asserted, *Lane* "does not provide us with guidance for this case." Pet. App. 19c. The court therefore concluded that *Popovich* was still controlling and that under the holding of that case, Title II's abrogation was valid only for claims "sounding in due process." *Ibid.* (citing *Popovich*, 276 F.3d at 812). Because petitioners' claims "implicate equal protection concerns" rather than due process, the Sixth Circuit held that the Eleventh Amendment barred their suit. *Ibid.*

5. Petitioners filed a petition for a writ of certiorari. Because the parties and courts below had not notified the Attorney General that the constitutionality of federal law had been called into question in the litigation, see 28 U.S.C. 2403(a); Fed. R. App. P. 44(a); Sup. Ct. R. 29.4(b), the United States invoked its right to intervene. The government recommended that the court of appeals' decision be vacated and the case remanded for further consideration in light of *United States* v. *Georgia*, 546 U.S. 151 (2006), and *Tennessee* v. *Lane*, *supra*. See Gov't Br. at 6-14, *Haas* v. *Quest Recovery Servs., Inc.*, 127 S. Ct. 1121 (2007) (No. 06-263). The United States explained that in *Georgia*, this Court had unanimously agreed that the abrogation question is not presented if a complaint does not allege misconduct that violates Title II. *Id.* at 7-8 (citing *Georgia*, 546 U.S. at 159). Thus, the United States pointed out, under the Sixth Circuit's own Title II analysis (which had concluded that petition-

ers failed to state a claim), this case presented no occasion to address abrogation. *Id.* at 8.

This Court granted the petition, summarily vacated the court of appeals' decision, and remanded the case "for further consideration in light of 28 U.S.C. § 2403(a) to consider the views of the United States." *Haas* v. *Quest Recovery Servs., Inc.*, 127 S. Ct. 1121, 1122 (2007). Justice Ginsburg filed a concurring statement noting that "[i]f, on remand, the Court of Appeals again holds that petitioners failed to state a claim under Title II, this Court would benefit from a fuller statement of the reasoning underling that decision." *Ibid.*

6. On remand, the court of appeals entertained further briefing from the parties, including the United States. In its brief, the government argued that, if the court again determined that petitioners did not state a valid Title II claim against the State, then the court should not reach the question whether Title II validly abrogated the State's sovereign immunity. The government further argued that, if the court concluded that petitioners *did* state a valid Title II claim against the State, then the court should follow the analysis set forth in *Georgia*. Furthermore, the government requested that, if in applying the *Georgia* framework the court concluded that the complaint stated a valid Title II claim against the State that would not amount to a constitutional violation, see *Georgia*, 546 U.S. at 159, then the court should order full briefing on the validity of Title II and its abrogation in the corrections context so that the United States might set forth a full defense of the statute, consistent with 28 U.S.C. 2403(a). Gov't C.A. Letter Br. 2-7.

The court of appeals again affirmed, in an unpublished disposition. Pet. App. 2b-7b. Following the anal-

ysis that this Court set out in *Georgia*, the court examined whether petitioners had stated a claim under Title II before considering the question of abrogation. *Id.* at 4b. The court concluded that they had not, because "[t]he only allegation in the Amended Complaint which might implicate Title II liability is that the State of Ohio owned the building housing the Quest facility." *Id.* at 6b. That allegation was insufficient, the court held, because "the ADA does not necessarily require a public entity to make its existing physical facilities accessible"; petitioners had not alleged any facts (such as a post-ADA renovation) that would give rise to such an obligation; and Ohio's driver-intervention programs appeared on their face to be accessible to people with disabilities. *Id.* at 6b-7b. Because the court of appeals concluded that petitioners had not stated a Title II claim, the court—in accordance with the *Georgia* framework—did not address whether Title II validly abrogates state sovereign immunity in the context implicated by this case (or whether *Popovich* remains good law). *Id.* at 7b.

ARGUMENT

The court of appeals correctly applied the framework set out in *United States* v. *Georgia*, 546 U.S. 151 (2006), and determined that this case does not present the question whether Congress validly abrogated States' sovereign immunity in enacting Title II. As the court of appeals recognized, conduct that does not violate Title II does not raise the abrogation question at all. This case therefore is not a suitable vehicle to address petitioners' arguments in support of abrogation. The threshold question on which the court of appeals ruled is fact-dependent and does not independently merit review. The petition therefore should be denied.

1. Petitioner is incorrect in asserting that the court of appeals "plainly did *not* comply with [this Court's] instructions 'to consider the views of the United States.'" Pet. 8 (quoting *Haas* v. *Quest Recovery Servs., Inc.*, 127 S. Ct. 1121, 1122 (2007)). To the contrary, the court of appeals' disposition on remand is fully consistent with the position the United States urged. The government argued that if the court of appeals remained of the view that petitioners had not stated a claim under Title II, the court should withdraw the portion of its previous opinion that nonetheless opined, contrary to *Georgia*, on the abrogation question. Gov't C.A. Letter Br. 3-4. The court of appeals did just that and, therefore, correctly resolved this case based on its predicate conclusion that the complaint failed to state a Title II claim against the State.*

The court of appeals' opinion on remand properly recognized that "under *Georgia*, the constitutional question—abrogation of Eleventh Amendment immunity—will be reached only after finding a viable claim under Title II." Pet. App. 4b. The court then held that petitioners lack such a viable claim. Accordingly, the court was correct to conclude that it "need not reach the remaining prongs of the *Georgia* analysis," *id.* at 7b, including whether Title II's abrogation of sovereign immunity is constitutionally valid.

2. Because the court of appeals complied with this Court's mandate, properly applied *Georgia*, and thus did not reach the constitutional question, this Court should decline petitioners' invitation to decide that question in the first instance. Indeed, if petitioners cannot state a

* The court of appeals also provided a complete statement of the reasons for that conclusion. See Pet. App. 5b-7b; see also *Haas*, 127 S. Ct. at 1122 (Ginsburg, J., concurring).

claim against Ohio under Title II, the question whether States may sometimes be subject to suit under Title II simply does not affect the disposition of this case. Furthermore, even to the extent petitioners still have a stake in the constitutional question, that question is particularly inappropriate for review in this posture.

This Court's general practice is not to decide legal questions not addressed below. See, *e.g.*, *NCAA* v. *Smith*, 525 U.S. 459, 470 (1999). The Court adheres to that policy with particular firmness when the question not previously addressed is a constitutional one. See, *e.g.*, *Ashwander* v. *TVA*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring). And questions of Congress's authority to abrogate state sovereign immunity are particularly unsuitable for this Court to take up without a reasoned decision below, because they often require factual development on two levels. First, the precise scope of petitioners' allegations must be established. Even if this Court believed that petitioners had stated a Title II claim, under *Georgia* it would then examine to what extent petitioners allege conduct that violates the Fourteenth Amendment. See *Georgia*, 546 U.S. at 159; see also *id.* at 160, 163 (Stevens, J., concurring) (noting that the lower courts' development of a factual record may be helpful to the proper application of the abrogation analysis). Second, to the extent that petitioners could identify some conduct prohibited by Title II but not by the Fourteenth Amendment, the question whether Title II's abrogation of sovereign immunity is a congruent and proportional use of the power to enforce the Fourteenth Amendment would require consideration of the extensive factual record compiled by Congress. See, *e.g.*, *Tennessee* v. *Lane*, 541 U.S. 509, 524-528 (2004); *Board of Trs. of the Univ. of Ala.* v. *Garrett*, 531 U.S. 356, 368-374

(2001). In each of those respects this case would be a particularly poor vehicle for this Court to consider the constitutional question.

3. Nor is there a mature conflict in the lower courts that calls for this Court's intervention at this time. The court of appeals' compliance with this Court's remand order has eliminated any direct conflict on the question of Title II's constitutionality.

This Court's decision in *Lane* refined the analysis that determines the constitutional validity of abrogation provisions, including Title II's. Because remedial legislation like the ADA may have been enacted to address violations of more than one constitutional right, and because identifying the right in question is crucial to determining the degree of judicial scrutiny that applies, the Court focuses not on "Title II * * * as an undifferentiated whole," but on the particular context implicated by each case. *Lane*, 541 U.S. at 530; see *id.* at 522-523 ("Title II * * * seeks to enforce [the Equal Protection Clause's] prohibition on irrational disability discrimination. But it also seeks to enforce a variety of other basic constitutional guarantees, infringements of which are subject to more searching judicial review."). If Title II is valid as applied to the particular context at issue, the Court "need go no further." *Id.* at 531.

Petitioners fail to identify any conflict in the appellate decisions applying *Lane*'s analysis to Title II. Despite petitioners' suggestions to the contrary (Pet. 9, 15, 17-18), the court of appeals in this case no longer relies on *Popovich* v. *Cuyahoga Court of Common Pleas*, 276 F.3d 808 (6th Cir.) (en banc), cert. denied, 537 U.S. 812 (2002), a decision that predated *Lane* and, in the government's view, is irreconcilable with it. See Gov't Br. at 10-13, *Haas*, *supra* (No. 06-263). Indeed, except for the

now-superseded opinion in this case, the Sixth Circuit has not adhered to *Popovich* in any reported disposition since this Court decided *Lane*.

Petitioners rely principally on alleged inconsistencies within a set of decisions that *uphold* Title II's abrogation of sovereign immunity. But any variation in the reasoning of those decisions is largely the product of this Court's instruction in *Lane* that the abrogation analysis should focus on the particular rights and the particular context at issue in each case. See, *e.g.*, *Toledo* v. *Sanchez*, 454 F.3d 24, 40 (1st Cir. 2006) (upholding Title II "as it applies to the class of cases implicating the right of access to public education"), cert. denied, 127 S. Ct. 1826 (2007); *Bowers* v. *NCAA*, 475 F.3d 524, 554-556 (3d Cir. 2007) (same); *Constantine* v. *Rectors & Visitors of George Mason Univ.*, 411 F.3d 474, 484-490 (4th Cir. 2005) (upholding "the remedial measures of Title II *only* as they apply to the class of cases implicating the right to be free from irrational disability discrimination in public *higher* education") (second emphasis added); *Association for Disabled Americans* v. *Florida Int'l Univ.*, 405 F.3d 954, 956-959 (11th Cir. 2005) (similar); see also *Klingler* v. *Director, Dep't of Revenue*, 455 F.3d 888, 896-897 (8th Cir. 2006) (holding that Title II did not validly abrogate sovereign immunity in the context of an allegedly discriminatory surcharge on parking placards); *Keef* v. *State, Dep't of Motor Vehicles*, 716 N.W.2d 58, 66-67 (Neb. 2006) (same).

As petitioners note (Pet. 16), the Ninth Circuit categorically upheld Title II before *Lane*, and in a brief 2004 disposition that court deemed its previous reasoning unaffected by *Lane*. See *Phiffer* v. *Columbia River Corr. Inst.*, 384 F.3d 791, 792-793 (9th Cir. 2004) (per curiam), cert. denied, 546 U.S. 1137 (2006). Even if

there are some methodological distinctions between the Ninth Circuit's approach and that in *Lane*, see, *e.g.*, *id.* at 793 (O'Scannlain, J., concurring) (opining that *Lane*'s analysis is "significantly more exacting than that employed by our circuit"), the courts of appeals have not come into direct conflict on the question whether, applying the *Georgia* analysis to a particular context, Title II validly abrogates Eleventh Amendment immunity in that context. And petitioners have provided no reason for the Court to address that question in the absence of such a conflict.

4. Petitioners also contend (Pet. 21-30) that the court of appeals erred in concluding that they failed to state a claim under Title II. As the court of appeals recognized, petitioners would have to prevail on that question before the issue of abrogation would be properly presented. Because the United States intervened only to address the constitutionality of Title II, it has taken no position in this case on the merits of petitioners' ADA claim as pleaded. Nevertheless, insofar as that question interrelates with the constitutionality of Title II's abrogation of sovereign immunity under the *Georgia* framework, the issue does not warrant review either. Petitioners allege no circuit conflict arising from the court of appeals' unpublished disposition, and their contention that the court of appeals erred in concluding that they failed to state a Title II claim against the State turns largely on the factual sufficiency of the allegations of their amended complaint. That fact-bound contention does not merit plenary review in this Court. And given the unsuitability of the constitutional question for certiorari, see pp. 10-12, *supra*, there is no reason to grant certiorari to address whether the complaint states a Title II claim based on the possibility that an affirmative

answer to the latter question could prompt the abrogation issue.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

GREGORY G. GARRE
Acting Solicitor General
GRACE CHUNG BECKER
Acting Assistant Attorney General
DIANA K. FLYNN
SARAH E. HARRINGTON
Attorneys

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